STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals
Hoekstra, P.J., and Murphy and Markey, JJ.

CHRISTIE DeRUITER,

Appellee,

v

TOWNSHIP OF BYRON,

Appellant.

Michigan Supreme Court No. 158311
Court of Appeals Docket No. 338972
Lower Court Case No.: 16-04195-CZ

AMICUS CURIAE BRIEF OF THE MICHIGAN TOWNSHIPS ASSOCIATION IN SUPPORT OF APPELLANT TOWNSHIP OF BYRON

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STATEMENT OF APPELLATE JURISDICTION

Amicus Curiae, the Michigan Townships Association concurs with Appellant Township of Byron's (Township) Statement of Jurisdiction contained in the Township's Application for Leave to Appeal.

STATEMENT OF QUESTION PRESENTED

I. WHETHER REGISTERED CAREGIVER CULTIVATION OF MEDICAL MARIHUANA WITHIN AN ENCLOSED, LOCKED, FACILITY PURSUANT TO THE MICHIGAN MEDICAL MARIHUANA ACT, MCL 333.26421 ET SEQ., PREEMPTS MUNICIPAL ZONING ORDINANCE AUTHORITY TO REGULATE WHERE IN THE MUNICIPALITY SUCH CULTIVATION MAY OCCUR PURSUANT TO THE MICHIGAN ZONING ENABLING ACT, MCL 125.3101 ET SEQ.?

APPELLANT TOWNSHIP ANSWERED	"NO"
APPELLEE DeRUITER ANSWERED	"YES"
AMICUS CURIAE ANSWERS	"NO"
CIRCUIT COURT ANSWERED	"YES"
COURT OF APPEALS ANSWERED	"YES"

STATEMENT OF FACTS

Amicus Curiae, the Michigan Townships Association concurs with and hereby adopts the Township's Summary of Material Proceedings and Facts as contained in the Township's Application for Leave to Appeal.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Michigan Townships Association is a Michigan non-profit corporation whose membership consists of in excess of 1,235 townships within the State of Michigan (including both general law and charter townships) joined together for the purpose of providing education, exchange of information and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws and statute of the State of Michigan. The Michigan Townships Association, established in 1953, is widely recognized for its years of experience and knowledge with regard to municipal issues. Through its legal defense fund, the Michigan Townships Association has participated as amicus curiae in numerous state and federal cases presenting issues of statewide significance to Michigan townships. This Amicus Curiae Brief is authorized by the Michigan Townships Association.

This appeal presents matters of statewide importance to Michigan municipalities involving the preemption of zoning ordinance provisions adopted pursuant to the Michigan Zoning Enabling Act (MZEA), MCL 125.3101, *et seq.*, regulating where in the municipality registered caregivers are allowed to cultivate medical marihuana pursuant to the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. As will be examined herein, the Township's zoning ordinance regulations regarding the location of medical marihuana cultivation within the Township are not inconsistent with the MMMA as such regulations compatibly coexist and the MMMA remains effective.

In this case, the Court of Appeals[1], in affirming the Circuit Court's summary disposition, erroneously determined that zoning ordinance locational regulations regarding the cultivation of marihuana are preempted by the MMMA. This determination is contrary to statutory intent, case law[2], and a municipality's authority to properly regulate land uses for the benefit of their citizens' public health, safety and welfare through zoning. The sheer number of medical marihuana patients and caregivers licensed to cultivate marihuana in this State[3] will eviscerate proper land use planning and zoning if local municipalities are unable to zone with regard to the proper location for this activity in a compatible coexistent manner. It should also be noted that there are other current appellate cases, pending at various stages, evidencing the difficulties facing local municipalities in understanding the proper interaction between zoning regulations and the MMMA.[4] This Honorable Court's review and determination of the issues presented will serve to define the scope of municipal zoning authority compatible with the MMMA and thereby help resolve the problems causing continual litigation.

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[1] *DeRuiter v Township of Byron*,__Mich App__(Docket No. 338972), Published Opinion Per Curiam, decided July 17, 2018, (Court of Appeals Opinion).

[2] See in part the following arguments herein regarding *Ter Beek v City of Wyoming*, 495 Mich 1; 846 NW2d 531 (2014) (*Ter Beek II*) affirming *Ter Beek v City of Wyoming*, 297 Mich App 446; 823 NW2d 864 (2012) (*Ter Beek I*).

[3] *The Medical Marihuana Act Statistical Report for Fiscal Year 2017*, by Andrew Brisbo, Director, Bureau of Medical Marihuana Regulation, reports 269,553 Medical Marihuana Patients and 43,183 Caregivers in Michigan. Attachment A hereto.

[4] *City of Warren v Clayton Jamers Bezy,* Court of Appeals Case Number 341639; *Charter Township of York v Miller*, 322 Mich App 648; 915 NW2d 373 (2018); *Charter Township of Ypsilanti v Pontius,* Unpublished Per Curiam Opinion of the Court of Appeals Case Number 340487 (2018), 2018 WL 5629643.

ARGUMENT

I. REGISTERED CAREGIVER CULTIVATION OF MEDICAL MARIHUANA WITHIN AN ENCLOSED, LOCKED, FACILITY PURSUANT TO THE MICHIGAN MEDICAL MARIHUANA ACT, MCL 333.26421 ET SEQ., DOES NOT PREEMPT MUNICIPAL ZONING ORDINANCE AUTHORITY TO REGULATE WHERE IN THE MUNICIPALITY SUCH CULTIVATION MAY OCCUR PURSUANT TO THE MICHIGAN ZONING ENABLING ACT, MCL 125.3101 ET SEQ.

A. INTRODUCTION

This appeal presents matters of major statewide importance to Michigan municipalities with regard to their ability to regulate through zoning ordinance provisions, as authorized by the Michigan Zoning Enabling Act (MZEA), MCL 125.3101, *et seq.*, the proper locations within the municipality for the cultivation of medical marihuana pursuant to the Michigan Medical Marihuana Act (MMMA), MCL 333.26421, *et seq*. At issue is the erroneous Court of Appeals Opinion affirming the Circuit Court's summary disposition in favor of the Appellee determining that the Township's zoning ordinance regulations prohibiting a medical marihuana caregiver's cultivation of medical marihuana from being located in a commercial building were in direct conflict with the MMMA and were therefore preempted. The Court of Appeals erroneously concluded that:

> "…the MMMA permits medical use of marijuana, particularly the cultivation of marijuana by registered caregivers, at locations regardless of land use zoning designations as long as the activity occurs within the statutorily specified enclosed, locked facility."[5]

This conclusion in the Court of Appeals Opinion is in direct conflict with the Court of Appeals decision in *Ter Beek I* which was affirmed by this Honorable Court in *Ter Beek II*.

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[5] *DeRuiter*, ___Mich App at *4.

Although the *Ter Beek I and II* decisions struck down the City of Wyoming's zoning ordinance provision that operated as a complete ban on medical marihuana use, the Court of Appeals in *Ter Beek I* stated that:

> "**This is not a case in which zoning laws are enacted to regulate in which areas of the city the medical use of marijuana as permitted by the MMMA may be carried out**."[6]

This statement by the Court of Appeals clearly indicates that zoning ordinance provisions that compatibly regulate the location of medical marihuana use, which includes cultivation under the MMMA, are not preempted.[7] As authorized, controlling the location in the Township where the cultivation of medical marihuana can occur is exactly what Byron Township's challenged zoning ordinance provisions were accomplishing. The Court of Appeals Opinion inappropriately conflates the required security of cultivated marihuana in an enclosed locked facility under the MMMA with preemptive authority controlling the locations within the municipality where cultivation is allowed.

The MZEA provides for a comprehensive statutory system authorizing municipalities to adopt a zoning ordinance to broadly regulate land uses within their communities, with the intent, in part, of ensuring that land uses are situated in appropriate locations and relationships.[8] A zoning ordinance is based upon a land use plan (Master Plan).[9] The Master Plan is developed through a detailed process resulting in a carefully crafted comprehensive scheme for determining current and future land uses specific to that community. Thereafter, a zoning ordinance is adopted (or amended) to effectuate the intent and purpose of the Master Plan. Most municipalities in the State engage in the regulatory control of land uses through zoning, thereby

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[6] *Ter Beek I*, 297 Mich App at 456 fn 4 (Emphasis added).
[7] As will be discussed further herein, this Honorable Court more generally left the door open for local regulation of the cultivation of medical marihuana in *Ter Beek II*, 495 Mich at 24 fn 9.
[8] MCL 125.3201(1), *infra*.
[9] *Id.*

designating such things as the proper zoning district for certain land uses, the compatibility of certain uses, allowed principal uses, allowed accessory uses, provisions for home occupations, bulk regulations such as minimum building setbacks, maximum height, maximum lot coverage, size of principal and accessory buildings, and permitted and special land uses. Zoning advances a community's quality of life by regulating neighboring land uses to ensure compatibility. Zoning also allows for intentional growth opportunities by encouraging residential, commercial, industrial and agricultural uses in appropriate areas of the municipality. A municipality's zoning authority arises under the MZEA, is broad and should be liberally construed in favor of the local municipality.[10]

The MMMA contains no particular mention of municipal zoning authority or its correlation to the MZEA. Instead, the MMMA is a voter initiated law enacted in 2008 and functions as an exception to the prohibition on the use of controlled substances. This statutory exception creates a system where the State registers a patient with a debilitating medical condition to permit the individual's medical use of marihuana. A medical marihuana patient is allowed to cultivate up to 12 marihuana plants.[11] An individual patient caregiver can be registered by the State to assist up to 5 patients with the medical use of marihuana.[12] This allows a caregiver, who can also be a patient, to cultivate up to 72 marihuana plants (12 per patient).[13] The MMMA language encompasses the State's registration of these patients and caregivers and contains no zoning standards to regulate the use or development of land by these lawful users of medical marihuana.[14]

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[10] *Frens Orchards, Inc. v Dayton Township*, 253 Mich App 129, 132; 654 NW2d 346 (2002).
[11] MCL 333.26424(a).
[12] MCL 333.26426(d).
[13] MCL 333.26424(b).
[14] It functions as a regulation of an activity not a land use. Zoning governs land uses. See *Square Lake Hills Condo Ass'n v Bloomfield Twp*, 437 Mich 310, 323-325; 471 NW2d 321 (1991) and *Natural Aggregates Corp v Brighton Twp*, 213 Mich App 287, 300-302; 539 NW2d 761 (1995).

In this case, the Township's zoning ordinance prohibits a registered caregiver's cultivation of medical marihuana in commercial buildings and instead provides for its location as a home occupation associated with dwellings. These provisions are not inconsistent with the MMMA and instead result in establishing a situation where both the statute and the ordinance can coexist and be effective.[15] The Township is not prohibiting lawful cultivation of medical marihuana as in *Ter Beek I and II* but rather requiring the caregivers registered by the State to carry out the cultivation as a home occupation. This restriction does not conflict with the MMMA as it would still allow medical marihuana cultivation albeit with zoning regulations for the protection of the public health, safety and welfare and to further ensure compatibility with neighboring properties. There is no evidence to suggest that the small amounts of marihuana being cultivated by a caregiver cannot occur as a home occupation. It is a much more reasonable interpretation that the MMMA would allow zoning to require that these hundreds of thousands of patients and caregivers cultivate at their residence. The Township's zoning ordinance requirements can coexist with the MMMA and the MMMA is still effective even with the Township prohibiting the location of medical marihuana cultivation activities in commercial buildings. These regulations also work to preserve the commercial nature and development strategies of the Township in establishing certain permitted uses in its commercial zoning district.

To begin to grasp the potential impact of the Court of Appeals Opinion that a registered caregiver's cultivation in an enclosed locked facility is not required to comply with local zoning regulations, this Court need only consider the number of registered qualifying patients and caregivers in the State. As of 2016 there were 269,553 medical marihuana patients and 43,183

[15] See *Howell Twp v Rooto Corporation*, 258 Mich App 470, 476-477; 670 NW2d 713 (2003) regarding when a statute and ordinance are incompatible.

caregivers authorized by the MMMA to cultivate marihuana.[16] Requiring these individuals to carry out the cultivation at their home or as a home occupation is both reasonable and compatible with the MMMA authorization. Imagine the absurdity of over 300,000 people in Michigan being exempt from local zoning restrictions and among other things being able to locate the cultivation of marihuana in any location they want within a community.[17]

As will be discussed herein, the practical consequences of preemption of a municipality's ability through zoning to address the compatibility of land uses as it relates to medical marihuana cultivation produces incongruous results (i.e., no locational standards, no building size standards, no building lot coverage standards, no building setback standards, no building height standards, unoccupied homes in the middle of residential neighborhoods used only for marihuana cultivation, retail downtown storefronts used instead for private cultivation, non-compliance with building, electric and plumbing codes, etc). This will subvert all of the efforts put forth by a municipality in planning for the community's ordered development and growth and most certainly have a deleterious effect on the community's health, safety, and property values. As will be further discussed herein, the Court of Appeals Opinion was clearly in error in its finding of preemption.[18]

B. STANDARD OF REVIEW

Summary disposition decisions are reviewed *de novo*.[19] In addition, issues of statutory interpretation are questions of law that are reviewed *de novo*.[20] Finally, the Court reviews *de novo* whether state law preempts an ordinance.[21]

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[16] Attachment A.
[17] Courts should avoid interpreting statutes in a manner that leads to absurd results. *Brandon Charter Township v Tippett*, 241 Mich App 417, 424; 616 NW2d 243 (2000).
[18] The Court of Appeals Opinion was actually in direct conflict with *Ter Beek I*, 297 Mich App at 456 fn 4.
[19] *Ter Beek II*, 495 Mich at 8.
[20] *In re: MCI Telecommunications*, 460 Mich 396, 413; 896 NW2d 164 (1999).

The issues in this case involve statutory interpretation of the MMMA and analysis to determine if the MMMA preempts the ability of a municipality to establish zoning ordinance locational regulations that prohibit the cultivation of medical marihuana in commercial buildings.

C. GENERAL RULES OF CONSTRUCTION

The Michigan Supreme Court has held that, "the intent of the electors governs the interpretation of voter-initiated statutes such as the MMMA, just as the intent of the Legislature governs the interpretation of legislatively enacted statutes. *People v Bylsma*, 493 Mich 17, 26, 825 NW2d 543 (2012). The first step when interpreting a statute is to examine its plain language, which provides the most reliable evidence of intent. If the statutory language is unambiguous, no further judicial construction is required or permitted because we must conclude that the electors intended the meaning clearly expressed. *Id.*"[22] Courts "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory."[23] Courts "interpret th[e] words in [the statute in] light of their ordinary meaning and their context within the statute and read them harmoniously to give effect to the statute as a whole."[24]

With the above rules of statutory construction in mind, it will be demonstrated that the Township's zoning regulations regarding the location of a registered caregiver's cultivation of medical marihuana are not in conflict with the MMMA. The express language of the MMMA governs certain activities and does not encompass in its scope the Township's zoning ordinance land use regulations. If all pertinent statutory provisions are read in context and in harmony with one another, this Honorable Court will clearly perceive that the Township may establish valid

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[21] *Ter Beek II*, 495 Mich at 8.
[22] *Ter Beek II*, 495 Mich at 8.
[23] *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012) citing *State Farm Fire & Cas. Co. v Old Republic Ins. Co.*, 466 Mich 142, 146; 644 NW2d 715 (2002).
[24] *Johnson,* 492 Mich at 177, citing *People v Peltola*, 489 Mich. 174, 181; 803 NW2d 140 (2011).

zoning restrictions to prohibit a registered caregiver's cultivation of medical marihuana from being located in a commercial building.

D. BROAD AUTHORITY PURSUANT TO THE MZEA MUST BE LIBERALLY CONSTRUED IN FAVOR OF THE TOWNSHIP.

It is also imperative to appropriately consider that the Michigan Constitution of 1963 grants to local municipalities liberal construction of their powers in their favor. This constitutional mandate will generally militate against a finding that a local municipality's zoning authority under the MZEA is preempted. The Michigan Constitution of 1963, Art. VII, §34, provides that:

> "The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution."

The broad authority arising under the MZEA should be liberally construed in favor of the Township in exercising the powers granted to it under the law.[25] In this regard Section 201 of the MZEA broadly authorizes local municipalities to provide for zoning within their communities as follows:

> "(1) A local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land, to ensure that use of the land is situated in appropriate locations and relationships, to limit the inappropriate overcrowding of land and congestion of population, transportation systems, and other public facilities, to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements, and to promote public health, safety, and welfare.
>
> (2) Except as otherwise provided under this act, the regulations shall be uniform for each class of land or buildings, dwellings, and structures within a district.

[25] *Frens Orchards,* 253 Mich App at 132.

> (3) A local unit of government may provide under the zoning ordinance for the regulation of land development and the establishment of districts which apply only to land areas and activities involved in a special program to achieve specific land management objectives and avert or solve specific land use problems, including the regulation of land development and the establishment of districts in areas subject to damage from flooding or beach erosion.
>
> (4) A local unit of government may adopt land development regulations under the zoning ordinance designating or limiting the location, height, bulk, number of stories, uses, and size of dwellings, buildings, and structures that may be erected or altered, including tents and recreational vehicles.[26]

This broad zoning authority, coupled with the above constitutional mandate of liberal construction in the Township's favor, underlies the Township's zoning authority to regulate the location of a caregiver's cultivation of medical marihuana and prohibit such cultivation from being located in a commercial building.

E. THE REGULATORY SCOPE OF THE MMMA DOES NOT INCLUDE LOCAL ZONING LAND USE AUTHORITY.

The statutory provisions at issue in this case are found in the MMMA.

The purpose of the MMMA is provided for as follows:

> "Sec. 2. The people of the State of Michigan find and declare that:
> (a) Modern medical research, including as found by the National Academy of Sciences' Institute of Medicine in a March 1999 report, has discovered beneficial uses of marihuana in treating of alleviating the pain, nausea, and other symptoms associated with a variety of debilitating medical conditions.
> (b) Data from the Federal Bureau of Investigation Uniform Crime Reports and the Compendium of Federal Justice Statistics show that approximately 99 out of 100 marihuana arrests in the United States are made under state law, rather than under federal law. Consequently, changing state law will have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana.
> (c) Although federal law currently prohibits any use of marihuana except under very limited circumstances, states are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law. The laws of Alaska, California, Colorado, Hawaii, Maine, Montana, Nevada, New Mexico, Oregon, Vermont, Rhode Island, and Washington do not penalize the medical

[26] MCL 125.3201 (Emphasis added).

use and cultivation of marihuana. Michigan joins in this effort for health and welfare of its citizens."[27]

These findings address the health benefit of medical marihuana and the protection from arrest for those who have a medical need to use marihuana. While the intent is clearly to allow individuals to use and cultivate medical marihuana without criminal penalty (i.e. activities), there is nothing in this language to suggest that this is intended to provide land use regulations preempting compatible coexisting local zoning.

In carrying forward this purpose, the relevant preemption language in the MMMA provides that:

> "(a) A qualifying patient who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed a combined total of 2.5 ounces of usable marihuana and usable marihuana equivalents, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount. The privilege from arrest under this subsection applies only if the qualifying patient presents both his or her registry identification card and a valid driver license or government-issued identification card that bears a photographic image of the qualifying patient.
> (b) A primary caregiver who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for assisting a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act. The privilege from arrest under this subsection applies only if the primary caregiver presents both his or her registry identification card and a valid driver license or government-issued identification card that bears a photographic image of the primary caregiver. This subsection applies only if the primary caregiver possesses marihuana in forms and amounts that do not exceed any of the following:
> (1) For each qualifying patient to whom he or she is connected through the department's registration process, a combined total of 2.5 ounces of usable marihuana and usable marihuana equivalents.

[27] MCL 333.26422.

(2) For each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility.
(3) Any incidental amount of seeds, stalks, and unusable roots."[28]

A review of the proceeding language again provides no specific preemption for zoning or other land use regulations. The above exemption from penalty language is naturally limited to the scope of the State's regulation in the MMMA. In this case, the registered caregiver is not being penalized for the activity of cultivating marihuana in a commercial building but instead the caregiver is treated like every other non-commercial user[29] in being prohibited from use of the commercial building. There are other locations in the Township where the proposed land use is allowed. The ordinary dictionary definition of penalty indicates that it is a "disadvantage."[30] The registered caregiver is personally receiving no disadvantage or other prejudicial condition under the Township's zoning regulations specifically related to their cultivation of medical marihuana. This understanding of penalty dovetails right into the next part of MCL 333.26424(b) where it states that the caregiver may not be "denied any right or privilege" in assisting a qualified patient. Growing any crop for non-commercial use, in a commercial building is not a right or privilege to begin with; therefore similarly prohibiting cultivation of marihuana in a commercial building is not denying any right or privilege. Similarly, the ability to carry on a home occupation without zoning authorization is not a general right or privilege.

While this language above does authorize in MCL 333.26424(b)(2) that a caregiver is allowed to cultivate 12 marihuana plants for each patient and how the marihuana plants are to be kept secure, this language clearly does not address or control the areas of the municipality where

[28] MCL 333.26424(a) and (b)(Emphasis added).
[29] Section F. below addresses the non-commercial nature of a registered caregiver's cultivation of medical marihuana.
[30] https://www.merriam-webster.com/dictionary/penalty (last accessed December 12, 2018)

this cultivation must occur. This is easily discernable in review of the MMMA definition of enclosed locked facility as follows:

> "'Enclosed locked facility' means a closet, room, or other comparable stationary, and fully enclosed area equipped with secure locks or other functioning security devices that permit access only by a registered caregiver, or registered qualifying patient. Marihuana plants grown outdoors are considered to be in an enclosed, locked facility if they are not visible to the unaided eye from an adjacent property when viewed by an individual at ground level or form a permanent structure and are grown within a stationary structure that is enclosed on all side, except for the base, by chain-link fencing, wooden slats, or a similar material that prevents access by the general public and that is anchored, attached, or affixed to the ground; located on land that is owned, leased or rented by either the registered qualifying patient or a person designated through the departmental registration process as the primary caregiver for the registered qualifying patient or patients for whom the marihuana plants are grown; and equipped with functioning locks or other security devices that restrict access to only the registered qualifying patient or registered primary caregiver who owns, leases or rents the property on which the structure is located. . . ."[31]

The Court of Appeals in this case improperly conflated required security in an enclosed locked facility with exclusive control over where in a municipality medical marihuana cultivation may be located.[32] Upon review of the above language, it is clear that nothing in the definition of an enclosed locked facility serves as a limitation or preemption of local zoning. The statutory language is silent as to ***where in a community*** marihuana can be cultivated. It cannot be presumed from that silence that the MMMA therefore displaces and preempts all municipal zoning control as to location or approved zoning district for land uses, including the growing of marihuana by a primary caregiver. The above recited rules of statutory construction and liberal reading for municipalities cannot justify the leap in logic that the Court of Appeals made – namely that because of the definition of an enclosed locked facility, such cultivation could occur in any zoning district, free from any zoning approval and with no obligation to comply with local zoning regulations as to setbacks, lot coverage, maximum building coverage

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[31] MCL 333.26423(d).
[32] *DeRuiter*, ___Mich App at *4.

or accessory building limitations. If a registered caregiver is unable to lawfully locate cultivation in a commercial building pursuant to local zoning, this language does not give them that right through preemption.[33]

Further with regard to the question of scope, the MMMA provides in part that:

"(e) All other acts and parts of acts inconsistent with this act do not apply to the medical use of marihuana as provided for by this act."[34]

It is clear that the intent is to preempt inconsistent laws. Upon review, the MMMA does not contain specific zoning locational regulations; therefore, zoning regulations regarding location would not be inconsistent where the regulations can coexist and remain effective.[35] Again the intent of the MMMA is to regulate activities not land uses.

Medical use of marihuana is defined as:

> "(h) 'Medical use of marihuana' means the acquisition, possession, cultivation, manufacture, extraction, use, internal possession, delivery, transfer, or transportation of marihuana, marihuana-infused products, or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition."[36]

While the definition above includes the cultivation of marihuana, the overall scope and focus of the MMMA is concerning the registration of patients and caregivers to engage in activities in compliance with the MMMA. This statute is intended to legalize certain medical uses of marihuana that were otherwise illegal; it is not intended to mandate zoning land use issues. Likewise, there is no reason to believe that the intent of the MMMA was to authorize or approve special zoning treatment for registered caregivers cultivating in an enclosed locked facility in compliance with the MMMA, as differentiated from any other permitted land use. A commercial building is for commercial land uses regardless of who is the user. Similarly, a home

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[33] *Ter Beek I*, 297 Mich App at 456 fn 4.
[34] MCL 333.26427(e).
[35] *Howell Twp*, 258 Mich App at 476-477.
[36] MCL 333.26423(h).

occupation land use is allowed for all home occupations regardless that the activity is cultivation of marihuana by a registered caregiver. The proper test as applied by the court in *Ter Beek II*, is whether the Townships zoning ordinance is inconsistent with the MMMA.[37] An ordinance is only inconsistent with a statue if the two cannot "coexist and be effective."[38] The Township's regulations do not prohibit the Appellee from cultivating marihuana in the Township and are not inconsistent with the scope of the statute. Both the statute and the ordinance can coexist and the MMMA regulations and protections can still be effective.

F. A CAREGIVER'S CULTIVATION OF MEDICAL MARHUANA IS NOT A COMMERCIAL USE.

MCL 333.26424(f) of the MMMA directly addresses the non-commercial nature of a registered caregiver's activities in assisting qualified patients in providing that:

> "A registered primary caregiver may receive compensation for costs associated with assisting a registered qualifying patient in the medical use of marihuana. Any such compensation does not constitute the sale of controlled substances."

A registered caregiver may only cover their cost in cultivation of marihuana for their patients. To a large degree their services are intended to be those of an altruistic caregiver to the medically debilitated. As worthy a duty as being a caregiver, it does not qualify as a commercial use appropriate for a location designed and planned for a commercial building. The ordinary dictionary definition for commercial is something "viewed with regard to profit."[39] Clearly this is not the activity of a registered caregiver who may only cover their costs. Prohibiting a registered caregiver's cultivation of medical marihuana from being located in a commercial building does not deny them a right or privilege or penalize them is any manner. Their non-commercial characterization is dictated by the MMMA.

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[37] *Ter Beek II*, 495 Mich at 22-24.
[38] *Howell Twp*, 258 Mich App at 476-477.
[39] https://www.merriam-webster.com/dictionary/commercial (last accessed on December 12, 2018).

G. THE MMMA DOES NOT PREEMPT TOWNSHIP ZONING AUTHORITY FROM PROHIBITING A CAREGIVER FROM USING A COMMERCIAL BUILDING TO CULTIVATE MEDICAL MARIHUANA.

The Court of Appeals Opinion held that a registered caregiver cultivating marihuana in compliance with the MMMA is not subject to zoning regulations. This determination was based upon an improper reading of the scope of the MMMA with regard to the cultivation of medical marihuana and the failure to consider whether the zoning ordinance regulations can coexist without rendering the MMMA ineffective. Specifically the Court held that:

> "We conclude that the MMMA permits medical use of marijuana, particularly the cultivation of marijuana by registered caregivers, at locations regardless of land use zoning designations as long as the activity occurs within the statutorily specified enclosed, locked facility. No provision in the MMMA authorizes municipalities to restrict the location of MMMA-compliant medical use of marijuana by caregivers. Neither does the MMMA authorize municipalities to adopt ordinances restricting MMMA-compliant conduct to home occupations in residential locations. So long as caregivers conduct their medical marijuana activities in compliance with the MMMA and cultivate medical marijuana in an "enclosed, locked facility" as defined by MCL 333.26423(d) and do not violate MCL 333.26427(b)'s location prohibitions, such conduct complies with the MMMA and cannot be restricted or penalized."[40]

In reaching this opinion, the Court of Appeals Opinion improperly expands the scope of the State's registration of patients and caregivers to engage in medical marihuana activities in compliance with the MMMA far beyond the regulatory focus addressed in E. above. The Court of Appeals Opinion effectively creates field preemption with regard to medical marihuana use in compliance with the MMMA as any local zoning enforcement that impacts such use is automatically a restriction or penalty and preempted. Such a decision goes well beyond the rulings in *Ter Beek I and II*, wherein the municipality's attempt to specifically prohibit the use of medical marihuana throughout the municipality was struck down.[41]

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[40] *DeRuiter*, ___Mich App at *4.

[41] A complete zoning prohibition of medical marihuana use in the municipality is obviously inconsistent with the intent of the MMMA.

In fact, this Court of Appeals Opinion is in direct conflict with *Ter Beek I* where the Court of Appeals stated that:

> "This is not a case in which zoning laws are enacted to regulate in which areas of the city the medical use of marijuana as permitted by the MMMA may be carried out."[42]

This language in *Ter Beek I* indicates specifically that locational zoning regulations may be appropriate. Carrying this statement forward in affirming *Ter Beek I,* this Honorable Court in *Ter Beek II* noted when discussing the extent that local regulation may apply to the cultivation and use of medical marihuana:

> "[T]his outcome does not 'create a situation in the State of Michigan where a person, caregiver, or group would be able to operate with no local regulation of their cultivation and distribution of medical marijuana. *Ter Beek* does not argue, nor do we hold that the MMMA forecloses all local regulation of marijuana; nor does this case require us to reach whether and to what extent the MMMA might occupy the field of medical marijuana regulation."[43]

Further, this Honorable Court stated that "[t]he MMMA does not create an absolute right to grow and distribute marihuana."[44] These pronouncements by the Michigan Supreme Court and Court of Appeals in *Ter Beek I and II* are clearly at odds with the Court of Appeals Opinion that the MMMA preempts municipal zoning locational regulations over the cultivation of medical marihuana in an enclosed locked facility.

In the case at bar, the Township's zoning regulations do not prohibit what the MMMA allows but rather provide complimentary land use regulations addressing items not within the regulatory scope or inconsistent with the MMMA.[45] The scope of the MMMA clearly does not

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[42] *Ter Beek I*, 297 Mich App at 456 fn 4.
[43] *Ter Beek II*, 495 Mich at 24 fn 9.
[44] *Ter Beek II*, 495 Mich at 24.
[45] It should be noted that while the Court of Appeals Opinion also referenced MCL 333.26427(b)(2) as locational standards providing a basis for preemption, these standards merely do not allow medical marihuana use in a school bus, on the grounds of any preschool or primary or secondary school or in any correctional facility. Identifying these three government grounds cannot reasonably be understood to expand the scope of the MMMA to preempt all local zoning.

extend to land use regulations regarding the proper location for medical marihuana cultivation or any other typical zoning standards such as dimensional minimums and maximums. The Township's zoning regulations as applied to the use of commercial buildings or residential home occupations are properly adopted pursuant to the broad land use authority granted to local municipalities pursuant to the MZEA.[46] This broad zoning authority is liberally construed in favor of the Township.[47] The practical effect of the erroneous Court of Appeals Opinion is that the MMMA will preempt all zoning that has any regulatory impact on medical marihuana use.

The Court of Appeals should have determined which (***if any***) of the Township's zoning regulations were in conflict and/or preempted by the MMMA, by considering whether the provisions can coexist and be effective. There is no evidence to suggest that patients and caregivers cannot operate effectively under the Township's zoning ordinance regulations. One could argue that it is self-evident that the zoning ordinance requirement that caregiver medical marihuana cultivation occur at one's residence and not in commercial buildings is not inconsistent with the MMMA since there are unequivocally numerous patients and caregivers effectively coexisting under such requirement.[48]

In further analyzing preemption, Michigan courts have found preemption between state law and local ordinances in two situations. "State law preempts a municipal ordinance in two situations: (1) where the ordinance directly conflicts with a state statute or (2) where the statute completely occupies the field that the ordinance attempts to regulate."[49] This Court has recently held that a zoning ordinance that prohibits the use of medical marihuana as permitted by the MMMA is preempted; but also that the zoning ordinance is ***preempted to the extent of the***

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[46] See Section D. above.
[47] *Frens Orchards,* 253 Mich App at 132.
[48] See Attachment A regarding the numbers of patients and caregivers.
[49] *Czymbor's Timber, Inc. v City of Saginaw*, 269 Mich App 551, 555; 711 NW2d 442 (2006), Aff'd 478 Mich 348 (2007).

conflict. [50] Therefore, there can be no immediate and blanket determination that a township cannot regulate medical marihuana uses through local zoning regulations. Further analysis of the MMMA language as it relates to the broad ability of a township to provide zoning regulations under the MZEA clearly fails to identify a conflict with prohibiting medical marihuana cultivation in commercial buildings.

The Michigan Supreme Court, in the seminal case of *People v Llewellyn*, 401 Mich 314, 323-325; 257 NW2d 902 (1977), articulated the following guidelines to determine whether a statute preempts an ordinance:

> "First where the state law expressly provides that the state's authority to regulate in a specified area of law is to be exclusive, there is no doubt that municipal regulations preempted.
>
> Second, preemption of a field of regulation may be implied upon an examination of legislative history.
>
> Third, the pervasiveness of the state regulatory scheme may support a finding of preemption. While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer pre-emption, it is a factor which should be considered as evidence of preemption.
>
> Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose of interest." (citations omitted)

In application of these guidelines it is apparent that the Township's zoning ordinance prohibiting medical marihuana cultivation in commercial buildings is not preempted by the MMMA. With regard to the first guideline, the MMMA is without any express language specifically preempting zoning in general or specifically with regard to the prohibition of the cultivation of medical marihuana by caregivers located in commercial buildings. There certainly is no direct conflict in this regard. Neither the Michigan Court of Appeals nor the Michigan

[50] *Ter Beek II*, 495 Mich at 24 (Emphasis added).

Supreme Court in *Ter Beek I and II* found exclusive jurisdiction and blanket preemption even in light of MCL 333.26427(e) which holds acts inconsistent with the MMMA as inapplicable.

With regard to the second guideline, there is nothing that would support a finding of field preemption with regard to municipal zoning. As previously discussed herein, from a review of the scope and purpose of the MMMA, it is very clear that it was intended to primarily address the health benefits of medical marihuana and to provide protection from arrest for those who have a medical need to use marihuana. There is nothing in the regulation of this field that would suggest a blanket preemption of a municipality's broad authority to regulate land use through zoning. The two issues are completely separate topics and are not necessarily incompatible or inconsistent.

Under the third guideline the pervasiveness of the state's regulatory scheme pursuant to the MMMA does not support a finding of preemption. The use of commercial buildings for cultivating marihuana is not so pervasive that zoning must be preempted with regard to this use. This would be no different than any other lawful use of land. The use can lawfully occur and be regulated by zoning without inherent conflict, and in fact is. While there are numerous Michigan medical marihuana users and caregivers, it cannot be said to be so pervasive that the MMMA would require preemption of zoning. The MMMA does not address typical land use regulations which would be necessary to address all of the issues regarding compatibility with neighboring properties such as building size, building lot coverage, principal uses of the building, accessory uses, building height, light, noise or location.

In *Frens Orchards*, the Court faced the contention that the regulation of migrant labor housing in Part 124 of the Public Health Code and the administrative rules promulgated thereunder was so extensive that any local control over migrant labor housing had been preempted. In that case, as here, the Township Zoning Ordinance regulated the permissible

location of the desired land use (migrant housing). In that case, as here, the state statutes and regulations either did not regulate the ***location*** of the land use at all, or addressed the location only incidentally "in terms of its relationship to other conditions that would affect the health and safety of the camp's occupants."[51]

This Court reached the following conclusion which would also be applicable to the instant case:

> "In sum, a reading of the pertinent sections of the zoning ordinance in conjunction with the cited statutes reveals that the ordinance addresses concerns not affected by the statutes and administrative rules addressed above. Therefore, the state's regulation is not so pervasive that it would support a finding of preemption."[52]

Finally, regarding the fourth preemption guideline, there is nothing within the nature of the regulated subject matter (medical marihuana) that would demand uniformity throughout the state. Zoning land use regulations are a matter of local concern and even within that regulatory scheme, municipalities are further divided into zoning districts in which certain allowed uses and regulations exist for each district. As long as such regulations do not subvert the ability to carry out the provisions under the MMMA, then such zoning ordinance regulations would not be preempted. An ordinance which does not permit the cultivation of marihuana in commercial buildings certainly does not subvert the ability to permissibly cultivate marihuana under the MMMA as a home occupation. There would be no need for the state to exclusively control such land use regulation regarding the location of medical marihuana cultivation. Cultivation of medical marihuana does not have to occur in a certain geographic, in contrast to mining.

As discussed above, the State legislature has directly or impliedly preempted certain land uses from the application of local zoning. For instance, the Right to Farm Act specifically preempts local regulations that conflict with the Act or with promulgated rules (GAAMPS)

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[51] *Frens Orchards,* 253 Mich App at 134.
[52] *Frens Orchards,* 253 Mich App at 135-136.

developed pursuant to the Act.[53] Additionally, Michigan courts have determined that certain land uses are immune from local zoning or that there are limits to what zoning regulations can be applied to these land uses.[54] As clearly shown by the Right to Farm Act, the Legislature knows how to craft the language indicating a direct preemption from the application of local zoning and other regulations. The MMMA, however, is devoid of any such preemption language regarding the application of zoning ordinances. Accordingly, there is no express conflict with the Township's zoning regulations. The Township's zoning regulations do not prohibit what the MMMA allows – namely the right to cultivate and use marihuana for medical conditions as described in the MMMA. If there is no direct conflict between the statutes, both must be permitted to exist.[55]

II. THE COURT OF APPEALS OPINION DETERMINING PREEMPTION OF THE TOWNSHIP ZONING ORDINANCE PRODUCES ABSURD RESULTS.

"Courts attempt not to interpret statutes, and by implication ordinances, in a manner that leads to absurd results."[56] Herein, however, it is easy to imagine some of the absurd results that may occur if the Court of Appeals Opinion determining that the MMMA preempts local zoning

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[53] "Beginning June 1, 2000, except as otherwise provided in this section, it is the express legislative intent that this act preempt any local ordinance, regulation or resolution that purports to extend or revise in any manner the provisions of this act or generally accepted agricultural and management practices developed under this act. Except as otherwise provided in this section, a local unit of government shall not enact, maintain or enforced an ordinance, regulation, or resolution that conflicts in any manner with this act of generally accepted agricultural and management practice developed under this act." MCL 286.474(6).

[54] See *Dearden v Detroit*, 403 Mich 257, 269 NW2d 139 (1978) (prisons); *Charter Township of Northville v Northville Pub Sch*, 469 Mich 285, 666 NW2d 231 (2003) (public schools); *Pittsfield Charter Township v Washtenaw County*, 468 Mich 702, 664 NW2d 193 (2003) (county buildings); *Herman v County of Berrien*, 481 Mich 352, 750 NW2d 570 (2008) (county facilities); *Township of Burt v Department of Natural Resources*, 459 Mich 659, 593 NW2d 534 (1999) (state boat ramp).

[55] *Rental Property Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 262; 566 NW 2d 514 (1997).

[56] *Brandon Charter Township*, 241 Mich App at 424.

regulations related to medical marihuana cultivation is upheld. This is especially true if over 300,000 registered patients and caregivers would be exempt from zoning regulation. For instance, if local zoning is preempted from applying to the cultivation of medical marihuana, a caregiver could construct a greenhouse for growing marihuana that entirely covers a single family residentially zoned lot in the middle of a developed single family subdivision. The greenhouse would not be subject to setback requirements, height requirements, or maximum lot coverage requirements. The cultivation would not be subject to any zoning penalty or regulation regardless of the land use impact.

Equally absurd would be the hundreds of thousands of caregivers and patients that would not be restricted to where they could locate their medical marihuana uses and could set up in incompatible locations and zoning districts throughout the municipality. The sheer number of caregivers and patients could easily destroy a designed retail corridor by filling all of the commercial buildings with marihuana grow operations. Also troublesome would be the uses of residential dwellings purely for grow operations with no residents living there. Large scale abuse could easily change the residential nature of a neighborhood, with the municipality having no recourse. Moreover, if the MMMA generally preempts the application of zoning, the rights of patients and caregivers will be elevated over those of all other residents and property owners in this State, with no municipal authority to manage or control those impacts. These absurd circumstances would not occur with this Court's proper interpretation of the MMMA.

Byron Township, as well as all other municipalities, has a governmental interest in protecting the public health, safety and welfare.[57] The Court of Appeals Opinion, in finding a conflict between the Township zoning ordinance locational requirements regarding the cultivation of marihuana and the MMMA, made what is effectively a wholesale and overbroad

[57] MCL 125.3201(1).

determination that the Township's zoning ordinance was preempted because of the prohibition against penalties in MCL 333.26424(b). This will be true in all cases where zoning enforcement impacts in any way the ability to cultivate marihuana under the MMMA. Arguably, this would equally preempt a registered caregiver's medical marihuana cultivation from compliance with any building, electrical, or plumbing code as a violator would be subject to penalty. These determinations are contrary to this Court holding that the MMMA does not foreclose all local regulation of the cultivation and use of medical marihuana.[58]

To avoid absurd results, it is instructive to review a likely approach that has developed through statute and case law for the application of the Michigan Right to Farm Act. The Right to Farm Act specifically states the express legislative intent that the Act preempt any local regulation that conflicts, extends or revises the provisions of the Act or any rule (GAAMPs) adopted under the Act.[59] When determining the extent of the Right to Farm Act's preemption of local zoning regulations regarding a greenhouse operation, the Michigan Supreme Court specifically noted that:

> "As no provision of the RTFA or any published generally accepted agricultural and management practice address the permitting, size, height, bulk, floor area, construction and location of buildings used for greenhouse or related agricultural purposes, no conflict exists between the RTFA and defendant city's ordinances regulating such matters that would preclude their enforcement under the facts of this case."[60]

This test, if applied to the requirement that registered caregivers operate as a home occupation for the cultivation of medical marihuana and are prohibited from commercial buildings, assists in the understanding that the Township's zoning considerations are not addressed in the MMMA and therefore no conflict exists. Accordingly, the zoning regulations can coexist with the MMMA.

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[58] *Ter Beek II*, 495 Mich at 24 fn 9.
[59] MCL 286.474(6).
[60] *Papadelis v City of Troy*, 478 Mich 934; 733 NW2d 396 (2007).

Both the Right to Farm Act and the MMMA provide an affirmative defense from prosecution if certain prerequisites are satisfied.[61] There is nothing in either of these laws, however, to indicate that an affirmative defense from prosecution or penalty translates into a right to avoid compliance with ordinances, regulations or requirements not otherwise contained in the statute. The Court of Appeals reviewed a similar fact pattern arising under the Right to Farm Act, holding that a circuit court's finding of preemption was in error. [62] In that case, a farmer challenged the County Road Commission's denial of a driveway permit that would have allowed him a second access to a field, claiming, among other things, that the denial impaired his ability to operate his farm.[63] The circuit court holding improperly expanded the scope of the Right to Farm Act when finding that any municipal action taken that impairs a farm or farm operation is improper.[64] On appeal, the Court of Appeals held that the circuit court had gone too far; the Court of Appeals instead found no preemption of local regulatory control as the County Road Commission driveway permit review did not purport to extend, revise or conflict with the Right to Farm Act or GAAMPs.[65] Moreover, tellingly, the Court of Appeals held that the Legislature intended the Right to Farm Act as a shield to protect farmers from nuisance claims, if they are engaged in commercial production and operating in compliance with GAAMPs.[66] The Court specifically noted, however, that the farmer was trying to use the RTFA as a sword, rather than the afforded shield, by trying to force the Road Commission to grant his driveway permit.[67] The Court found that the RTFA was not intended to nor did it provide authorization for a farmer to use the law as a sword to avoid compliance with municipal regulations. Specifically, ". . .no

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[61] MCL 286.473, MCL 333.26424, MCL 333.26428
[62] *Scholma v Ottawa County Road Commission*, 303 Mich App 12, 840 NW 2d 186 (2013), *leave denied* 497 Mich 887, 854 NW 2d 724 (2014) .
[63] *Id.*, at 24.
[64] *Id.*, at 16.
[65] *Id* at 24.
[66] *Id.*, at 26.
[67] *Id.*

provision of the RTFA requires a local government to take affirmative action, and to thereby change the status quo, to allow or enable a farmer to more effectively comply with the GAAMPs."[68] The *Scholma* Court also referenced a decision of this Court regarding the Right to Farm Act's interplay with a city's zoning regulations as applied to a greenhouse, finding that local zoning compliance was required to the extent that it did not prohibit what was permitted under the Right to Farm Act or a GAAMP.[69]

Likewise, herein, the same analysis should apply and guide this Court. A township should be allowed to enforce zoning regulations that do not prohibit what the MMMA allows. The Township should be able to plan for its community and land uses, and effectuate that plan by its zoning ordinance. Moreover, a registered caregiver should not be able to use the MMMA as a sword to excuse compliance with the most basic land use regulations, but instead should use MMMA compliance as a shield from arrest and penalty from using marihuana for medical purposes, as regulated by the MMMA. Nothing in the MMMA indicates or provides otherwise. The Court of Appeals decision is overbroad and would afford a caregiver the right to cultivate medical marihuana in any zoning district and in any manner he or she chose (free from setbacks, lot coverage, accessory building regulations, height restrictions). This absurd result is not based on the intent of the MMMA and acts to undermine municipal zoning authorities and powers.

III. ZONING ACTION TO ENFORCE PROHIBITION OF NON-COMMERCIAL CULTIVATION OF MEDICAL MARIHUANA USE OF A BUILDING ZONED FOR COMMERCIAL USE IS AN IN REM ACTION AND NOT A PERSONAL ACTION AGAINST THE REGISTERED CAREGIVER.

The personal protection afforded a registered caregiver from penalty or denial of a right or privilege as provided for in MCL 333.26424(b) does not apply to injunctive zoning actions to

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[68] *Id.*

[69] *Papadelis v City of Troy*, 478 Mich 934, 733 NW2d 397 (2007); see also *Lima Township v Bateson*, 302 Mich App 483, 838 NW2d 898 (2013).

enforce compliance with a zoning ordinance. While the *MMMA addresses* authorized medical marihuana *use activities*, *zoning* on the other hand *regulates land uses*.[70] Zoning enforcement injunctive actions are in rem actions against the land. To understand the importance of this distinction, it is important to define the differences between personal actions and in rem actions as injunctive zoning enforcement to prevent the non-commercial use of the commercial property would be an action taken against the property rather than as a penalty or damage against the person. As in this case, the Township notified the property owner that the property was being used in violation of the zoning ordinance. An injunctive order by the court to enjoin use of the property for non-commercial purposes would be taken against the property and would run with the property regardless of who the owner or user of the property is.[71] It is axiomatic that as land use regulations, zoning determinations run with the land.[72]

City of Detroit v 19675 Hasse, 258 Mich App 438; 671 NW2d 150, 161 (2003), is instructive in review of the differences between personal actions and in rem actions. In *City of Detroit,* the Court had to decide whether a statute of limitations precluded the City of Detroit's actions to foreclose tax liens on real property owned by the defendant. The Court held that statutes of limitations do not toll against local municipalities because the legislature has not enacted a statute of limitations for in rem foreclosure actions. The Court concluded that,

> "In sum, because the only claims at issue here seek foreclosure rather than damages, we conclude that these appeals involve in rem actions and not personal actions. Therefore, given the lack of a statute of limitations on in rem actions by the state or the city, its subdivision, we conclude that the trial court correctly declined to find the city's actions time-barred and properly granted the city summary disposition with respect to this claim as a matter of law."[73]

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[70] *Square Lake Hills Condo Ass'n*, 437 Mich at 323-325; and *Natural Aggregates Corp*, 213 Mich App at 300-302.

[71] It is important to note that even though MCL 333.26424(a) and (b) do not prohibit zoning enforcement, the zoning ordinance still cannot be inconsistent with the MMMA under MCL 333.26427(e).

[72] *Paragon Properties Co v City of Novi*, 452 Mich 568, 575; 550 NW2d 772 (1996).

[73] *City of Detroit*, 258 Mich App at 452.

The Court in *City of Detroit* determined that "personal actions are those brought for the recovery of personal property, for the enforcement of a contract or to recover for its breach, or for the recovery of damages for an injury to the person or property."[74] On the other hand, an in rem action is "entirely distinct" from in personam actions.[75] The Court further explained the differences between an action in personam and an action in rem as follows:

> "[A]ctions in personam differ from actions in rem in that actions or proceedings in personam are directed against a specific person, and seek the recovery of a personal judgment, while actions or proceedings in rem are directed against the thing or property itself, the object of which is to subject it directly to the power of the state, to establish the status or condition thereof, or determine its disposition, and procure a judgment which shall be binding and conclusive against the world. The distinguishing characteristics of an action in rem is its local rather than transitory nature, and its power to adjudicate the rights of all persons in the thing."[76]

Enforcement of a township zoning ordinance is directed against the property and precludes *anyone* from using real property in a manner that violates the same. It is an action to determine the status of the property. The specific owner or occupant of the property in question is irrelevant. No one may operate a non-commercial use in a commercially zoned building; to wit, non-commercial cultivation of medical marihuana. The purpose of an action to compel compliance with the zoning ordinance or injunctive relief is to preclude the *use of the subject property* in a manner that violates the township zoning ordinance. The enforcement action would constitute an in rem proceeding to compel compliance with the zoning ordinance's land use requirements; it would not seek damages from the individuals.

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[74] *City of Detroit*, 258 Mich App at 449.
[75] *Id.* at 449-450.
[76] *Id.* at 448 (Emphasis added).

Townships have statutory authority to enact and enforce zoning ordinances for the orderly planning of their communities pursuant to the MZEA.[77] Section 203 of the MZEA authorizes the Township to adopt a zoning ordinance designed to:

> "… promote the public health, safety, and general welfare, *to encourage the use of lands in accordance with their character and adaptability, to limit the improper use of land…*" (Emphasis added.)

Furthermore, the MZEA vests a local unit of government with the authority to provide a zoning ordinance "for the regulation of land development and the establishment of districts" and to adopt "land development regulations under the zoning ordinance designating or limiting the …**uses**..."[78] Moreover, a use of land that is in violation of a zoning ordinance is a nuisance per se.[79]

In this case, the Township would seek to enjoin the use of land that violates its Zoning Ordinance and this would not be transitory against the owner but rather local against the property and all persons with a right to use the property. Clearly, zoning enforcement is an in rem action against the land compelling compliance with the zoning ordinance and attempting to regulate the use of the property, not the specific violator. This in rem action does not seek enforcement of a contract or to recover for its breach, or for the recovery of damages for an injury to the person or property. The personal protection afforded a registered caregiver from penalty or denial of a right or privilege for marihuana activities as provided for in MCL 333.26424(b) would not apply to the in rem action.

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[77] *Lyon Charter Township v Petty*, 317 Mich App 482, 487; 896 NW2d 477 (2016).
[78] Michigan Zoning Enabling Act, Section 203; MCL 125.3201(3)-(4) (Emphasis added).
[79] MCL 125.3407.

CONCLUSION

Amicus Curiae respectfully requests that this Honorable Court peremptorily reverse the decision of the Court of Appeals based on improper expansion and construction of the MMMA as discussed herein. In the alternative, Amicus Curiae requests that the Application for Leave to appeal in this Court be granted in order to allow this Honorable Court to review the proper scope and application of the MMMA with regard to a municipality's regulatory authority.

Dated: December 17, 2018

BAUCKHAM, SPARKS, THALL,
SEEBER & KAUFMAN, P.C.

By: _____
Robert E. Thall (P46421)
Attorneys for Amicus Curiae,
Michigan Townships Association

ATTACHMENT A

Medical Marihuana Act

Statistical Report with Program Information and Financial Data

For Fiscal Year 2017

(Pursuant to MCL 333.26426 (i) (1), (2), (3), (4) and (5) and Section 507 of Public Act 268 of 2016)

November 28, 2017

Prepared by

Andrew Brisbo, Director

Bureau of Medical Marihuana Regulation

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GOVERNOR

LICENSING AND REGULATORY AFFAIRS
CUSTOMER DRIVEN. BUSINESS MINDED.

SHELLY EDGERTON
DIRECTOR

Table of Contents

Executive Summary:

The *Medical Marihuana Act Statistical Report with Program Information and Financial Data for Fiscal Year 2017* contains the reporting requirements pursuant to both MCL 333.26426 (i) (1), (2), (3), (4) and (5) and Section 507 of Public Act 268 of 2016.

The Michigan Medical Marihuana Act, Initiated Law 1 of 2008, Section 6 (i) [MCL 333.26426 (i) (1), (2), (3), (4) and (5)] states: The department shall submit to the legislature an annual report that does not disclose any identifying information about qualifying patients, primary caregivers, or physicians, but does contain, at a minimum, all of the following information:

(1) The number of applications filed for registry identification cards.

(2) The number of qualifying patients and primary caregivers approved in each county.

(3) The nature of the debilitating medical conditions of the qualifying patients.

(4) The number of registry identification cards revoked.

(5) The number of physicians providing written certifications for qualifying patients.

Public Act 268 of 2016 requires the following:

Sec. 507. *The department shall submit a report by January 31 to the standing committees on appropriations of the senate and house of representatives, the fiscal agencies, and the state budget director that includes all of the following information for the prior fiscal year regarding the medical marihuana program under the Michigan medical marihuana act, 2008 IL 1, MCL 333.26421 to 333.26430:*

(a) The number of initial applications received.

(b) The number of initial applications approved and the number of initial applications denied.

(c) The average amount of time, from receipt to approval or denial, to process an initial application.

(d) The number of renewal applications received.

(e) The number of renewal applications approved and the number of renewal applications denied.

(f) The average amount of time, from receipt to approval or denial, to process a renewal application.

(g) The percentage of initial applications not approved or denied within the time requirements established in section 6 of the Michigan medical marihuana act, 2008 IL 1, MCL 333.26426.

(h) The percentage of renewal applications not approved or denied within the time requirements established in section 6 of the Michigan medical marihuana act, 2008 IL 1, MCL 333.26426.

(i) The percentage of registry cards for approved initial applications not issued within the time requirements established in section 6 of the Michigan medical marihuana act, 2008 IL 1, MCL 333.26426.

(j) The percentage of registry cards for approved renewal applications not issued within the time requirements established in section 6 of the Michigan medical marihuana act, 2008 IL 1, MCL 333.26426.

(k) The number of registry identification cards issued to or renewed for patients residing in each county as of September 30 of the preceding fiscal year under the Michigan medical marihuana act, 2008 IL 1, MCL 333.26421 to 333.26430.

(l) The amount collected from the medical marihuana program application and renewal fees authorized in section 5 of the Michigan medical marihuana act, 2008 IL 1, MCL 333.26425.

(m) The costs of administering the medical marihuana program under the Michigan medical marihuana act, 2008 IL 1, MCL 333.26421 to 333.26430.

Pursuant to these requirements, this report has been prepared and issued electronically to the House and Senate appropriations standing committees, House and Senate Fiscal Agencies, and the state budget director to meet the both the annual and January 31 reporting requirements. In addition, this report is also online under the following locations:

- The Bureau of Medical Marihuana Regulation (BMMR) website at: www.michigan.gov/bmmr .
- The All About LARA section - Legislative Reports of the Department of Licensing and Regulatory Affairs website at: www.michigan.gov/lara.

Executive Background:

The Michigan Medical Marihuana Program (MMMP) is a state registry program within the Bureau of Medical Marihuana Regulation, Michigan Department of Licensing and Regulatory Affairs (LARA). The program administers the Michigan Medical Marihuana Act as approved by Michigan voters on November 4, 2008. The program implements the statutory tenets of this act in such a manner that protects the public and assures the confidentiality of its participants.

Specifically, the information provided in this report is based on data from October 1, 2016 through September 30, 2017.

Required Information for MCL 333.26426 (i) (1), (2), (3), (4) and (5):

(1) The number of applications filed for registry identification cards.

For Fiscal Year 2017, there were a total of 152,434 applications filed for medical marihuana registry identification cards.

(2) The number of qualifying patients and primary caregivers approved in each county.

The total number of patients and caregivers by county is listed below:

County	Patients	Caregivers
Alcona	381	66
Alger	206	34
Allegan	2,945	562
Alpena	752	106
Antrim	835	201
Arenac	687	131
Baraga	167	26
Barry	1,474	300
Bay	2,830	431
Benzie	729	141
Berrien	4,057	793
Branch	1,334	236
Calhoun	3,821	726
Cass	1,340	244
Charlevoix	733	148
Cheboygan	561	94
Chippewa	741	126
Clare	1,042	179
Clinton	1,622	287
Crawford	432	76
Delta	1,042	229
Dickinson	866	174
Eaton	3,791	688
Emmet	813	113
Genesee	17,559	3,173
Gladwin	834	152
Gogebic	493	100

County	Patients	Caregivers
Grand Traverse	3,019	515
Gratiot	1,086	173
Hillsdale	1,641	349
Houghton	679	123
Huron	553	64
Ingham	10,317	1,754
Ionia	1,456	228
Iosco	867	125
Iron	478	93
Isabella	1,297	210
Jackson	5,030	987
Kalamazoo	5,101	896
Kalkaska	864	165
Kent	10,654	1,544
Keweenaw	66	9
Lake	455	84
Lapeer	3,017	557
Leelanau	427	79
Lenawee	3,763	713
Livingston	4,234	693
Luce	127	21
Mackinac	298	51
Macomb	25,540	3,991
Manistee	766	137
Marquette	1,416	388
Mason	940	130
Mecosta	898	140
Menominee	691	137
Midland	1,621	236
Missaukee	341	79
Monroe	4,708	736
Montcalm	2,038	443
Montmorency	455	92
Muskegon	4,797	718
Newaygo	1,560	278
Oakland	31,587	4,679
Oceana	1,021	163
Ogemaw	632	108
Ontonagon	186	35
Osceola	672	132

County	Patients	Caregivers
Oscoda	223	38
Otsego	879	161
Ottawa	4,150	549
Presque Isle	356	65
Roscommon	924	155
Saginaw	5,017	741
Saint Clair	3,881	631
Saint Joseph	1,467	272
Sanilac	1,084	201
Schoolcraft	297	67
Shiawassee	2,623	451
Tuscola	2,359	481
Van Buren	2,371	494
Washtenaw	11,068	1,449
Wayne	44,520	6,199
Wexford	949	199
Total	269,553	43,183*

*Please note the grand total is less than the sum of the counties, as a single person could serve in multiple counties on different registrations.

(3) The nature of the debilitating medical conditions of the qualifying patients.

The name of the debilitating condition as well as the total percentage of medical marihuana patients who are afflicted with the debilitating condition:

Name of Debilitating Condition	% of Patients Afflicted with Debilitating Condition*
Acquired Immune Deficiency Syndrome (AIDS)	0.30%
Alzheimer's	0.05%
Amyotrophic Lateral Sclerosis	0.05%
Cachexia	0.77%
Cancer	5.00%
Crohn's disease	1.08%
Glaucoma	1.33%
Hepatitis C	1.15%
Human Immunodeficiency Virus (HIV)	0.35%
Nail Patella	0.02%

Post-Traumatic Stress Disorder (PTSD)	3.41%
Seizures – Epilepsy	2.18%
Severe and Chronic pain	92.77%
Severe and Persistent Muscle Spasms	21.99%
Severe Nausea	9.79%
Wasting Syndrome	0.96%

*The total adds up to more than 100% because most patients are diagnosed with more than one debilitating medical condition. The table above shows the percentage of all patients diagnosed with each condition.

(4) The number of registry identification cards revoked.

Zero registry cards were revoked in Fiscal Year 2017.

(5) The number of physicians providing written certifications for qualifying patients.

During Fiscal Year 2017, there were a total of 1,652 physicians who provided written certifications for qualifying medical marihuana patients.

Required Information for Section 507 of Public Act 268 of 2016:

(a) The number of initial applications received.

124,273

(b) The number of initial applications approved and the number of initial applications denied.

Approved: 111,443
Denied: 18,053

* The total initial applications approved and initial applications denied adds to more than the total initial applications received. This occurs because renewals become initial applications if they are not processed before the registration expiration date. A renewal application can be processed within the statutory timeframe of 15 business days, but the registration may expire before the renewal application is processed.

(c) The average amount of time, from receipt to approval or denial, to process an initial application.

6.89 business days

(d) The number of renewal applications received.

28,161

(e) The number of renewal applications approved and the number of renewal applications denied.

Approved – 19,217
Denied – 1,737

** The total renewal applications approved and denied is less than the total renewal applications. This occurs because renewals become initial applications if they are not processed before the registration expiration date. A renewal application can be processed within the statutory timeframe of 15 business days, but the registration may expire before the renewal application is processed.

*** The total initial and renewal applications approved and denied are less than the total initial and renewal applications received because we received more applications than we processed this fiscal year.

(f) The average amount of time, from receipt to approval or denial, to process a renewal application.

7.3 business days

(g) The percentage of initial applications not approved or denied within the time requirements established in section 6 of the Michigan medical marihuana act, 2008 IL 1, MCL 333.26426.

0.049%

(h) The percentage of renewal applications not approved or denied within the time requirements established in section 6 of the Michigan medical marihuana act, 2008 IL 1, MCL 333.26426.

0.0811%

(i) The percentage of registry cards for approved initial applications not issued within the time requirements established in section 6 of the Michigan medical marihuana act, 2008 IL 1, MCL 333.26426.

0%

(j) The percentage of registry cards for approved renewal applications not issued within the time requirements established in section 6 of the Michigan medical marihuana act, 2008 IL 1, MCL 333.26426.

0%

(k) The number of registry identification cards issued to or renewed for patients residing in each county as of September 30 of the preceding fiscal year under the Michigan medical marihuana act, 2008 IL 1, MCL 333.26421 to 333.26430.

County	New Patient Cards Issued By County	Patient Cards Renewed By County
Alcona	147	48
Alger	73	13
Allegan	1,073	317

County	New Patient Cards Issued By County	Patient Cards Renewed By County
Alpena	315	70
Antrim	286	74
Arenac	263	63
Baraga	62	11
Barry	591	141
Bay	1,088	191
Benzie	266	58
Berrien	1,818	398
Branch	503	137
Calhoun	1,460	303
Cass	579	170
Charlevoix	259	63
Cheboygan	216	59
Chippewa	284	81
Clare	368	87
Clinton	581	112
Crawford	140	61
Delta	324	161
Dickinson	302	63
Eaton	1,532	268
Emmet	330	84
Genesee	6,867	1,227
Gladwin	310	92
Gogebic	200	30
Grand Traverse	1,120	194
Gratiot	388	117
Hillsdale	565	187
Houghton	254	70
Huron	265	35
Ingham	4,453	539
Ionia	526	157
Iosco	335	66
Iron	178	39
Isabella	534	108
Jackson	1,940	365
Kalamazoo	2,141	499
Kalkaska	301	69

County	New Patient Cards Issued By County	Patient Cards Renewed By County
Kent	4,218	935
Keweenaw	17	8
Lake	147	54
Lapeer	1,158	300
Leelanau	159	27
Lenawee	1,461	326
Livingston	1,745	312
Luce	44	17
Mackinac	92	37
Macomb	11,558	1,364
Manistee	261	87
Marquette	472	113
Mason	396	93
Mecosta	321	107
Menominee	238	79
Midland	630	135
Missaukee	129	29
Monroe	1,884	322
Montcalm	618	292
Montmorency	136	63
Muskegon	1,686	435
Newaygo	575	148
Oakland	14,074	1,794
Oceana	359	119
Ogemaw	221	57
Ontonagon	50	16
Osceola	235	69
Oscoda	67	29
Otsego	341	59
Ottawa	1,753	335
Presque Isle	140	36
Roscommon	345	78
Saginaw	1,980	351
Saint Clair	1,553	309
Saint Joseph	578	178
Sanilac	400	83
Schoolcraft	73	58

County	New Patient Cards Issued By County	Patient Cards Renewed By County
Shiawassee	952	253
Tuscola	871	203
Van Buren	853	280
Washtenaw	4,883	747
Wayne	20,205	1,973
Wexford	329	80
Total	111,444	19,217

(l) The amount collected from the medical marihuana program application and renewal fees authorized in section 5 of the Michigan medical marihuana act, 2008 IL 1, MCL 333.26425.

$10,056,378.83

(m) The costs of administering the medical marihuana program under the Michigan medical marihuana act, 2008 IL 1, MCL 333.26421 to 333.26430.

$4,832,071.44

Conclusion:

The Bureau of Medical Marihuana Regulation executive and legislative charge is the oversight of medical marihuana in Michigan. This includes the administration and oversight of the MMMP. The information contained in this report is required pursuant to MCL 333.26426 (i) (1), (2), (3), (4) and (5) and Section 507 of PA 268 of 2016 and provides specific information regarding: identification cards, patients and primary caregivers, the nature of debilitating medical conditions of qualifying patients, the number of physicians providing written certifications for qualifying patients, revenue, expenditures, application determinations, and timeliness information of the MMMP for the time period beginning October 1, 2016 through September 30, 2017.